UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, **Petitioner,** **and**	)	
INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO, **Intervenor,** **v.**	)	**No. 17-71353**
CAESARS ENTERTAINMENT CORP., d/b/a RIO ALL-SUITES HOTEL AND CASINO **Respondent.**	)	
INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO, **Petitioner,** **v.**	)	**No. 17-73379**
NATIONAL LABOR RELATIONS BOARD, **Respondent.**	)	

OPPOSITION TO THE NATIONAL LABOR RELATIONS BOARD'S MOTION FOR PARTIAL SUMMARY ENFORCEMENT

Respondent Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino ("Rio" or the "Company") respectfully opposes the National Labor Relations Board's ("Board" or "NLRB") motion for partial summary enforcement of the Board's Order in this consolidated application for enforcement and petition

for review. Because the court lacks jurisdiction to enforce or review the Board's Order, Rio respectfully requests that the court dismiss the consolidated application and petition. Barring dismissal, Rio respectfully requests that the court deny enforcement and remand every appealed finding in the Board's Order. The Board's decision in *The Boeing Company*, 365 N.L.R.B. No. 154 (2017), overruled the essential test upon which it decided whether all the handbook rules at issue in this case would be "reasonably construed" to prohibit protected activity under the National Labor Relations Act ("Act"). Therefore, partial summary enforcement of the Board's Order would approve an inadequate, irrational, and arbitrary Board decision that is inconsistent with the Act and that evades a clear understanding of the legal standards that the Board enunciated in *Boeing*.

I. THE COURT DOES NOT HAVE JURISDICTION TO ENFORCE THE BOARD'S ORDER.

The Board asks this court to partially enforce an agency decision that would cause the withdrawal and replacement of a handbook. As Rio explained in its opening brief, the case and the fate of the handbook itself are still navigating the Board's own administrative channels. The question this court must therefore answer is a simple one: Can the Board petition this court to enforce an order that resolves some, but not all, of the allegations raised in a single complaint? Because the Board's failure to resolve all the allegations of the complaint renders the order non-final, the answer is no. That answer is particularly true here, where the scope

of the remedy—correction of the employee handbook—necessarily turns on adjudication of the remaining allegations. Non-final orders with incomplete remedies are not ripe for appellate review. *See, e.g., Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408-09 (9th Cir. 1996). An appeal from such an order should be dismissed. *See id.*

The Board attempts to sidestep that otherwise routine conclusion. Although it does not dispute the finality requirement, in its motion for partial summary enforcement, the Board asserts that it can manufacture jurisdiction in this court by dint of deciding a portion of the case while "severing" and remanding the rest. *See* Mot. at 2 & n.1. Even though the Board is certainly free to remand claims for further adjudication, its made-up severance procedure—described nowhere in the Board's rules or regulations—cannot circumvent the bedrock requirement of finality. The Act, the sole source of this court's jurisdiction here, requires an application from a final order such that "jurisdiction of the court shall be exclusive." 29 U.S.C. § 160(e) (2016). That exclusive jurisdiction requirement is just what the Board now asks this court to overlook by summarily enforcing a non-final order and requiring Rio to revise its employee handbook only to revise it again.

The Board does not dispute that section 10(e) of the Act requires a final order. Yet, without referring to a single rule or regulation (or even any sub-

regulatory agency guidance), the Board insists it can vest this court with jurisdiction over an otherwise non-final order by unqualifiedly "severing" unresolved claims from the same complaint and remanding them for further adjudication. Although the Board has wide discretion to resolve or remand claims as it sees fit, it cannot create jurisdiction in the federal courts of appeals without a statutory basis. It is up to this court to determine the finality of the Board's order for jurisdictional purposes, and an order that fails to resolve all the allegations of a single complaint—particularly where, as here, the scope of the remedy depends on resolution of the remaining claims—is not final. *See Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 996-98 & n.3 (9th Cir. 2003) (holding post-judgment order in analogous consent decree proceedings was non-final for jurisdiction purposes).

This court has but one source of jurisdiction over applications for enforcement of Board orders: section 10(e) of the Act. Throughout its 80-plus year history, the Act has been intended to give federal courts "the exclusive method of review in one proceeding after a final order is made." H.R. No. Rep. 1147, 74th Cong., 1st Sess., at 24 (1935). Whatever the Board's authority to "sever" unresolved claims, the Board cites no basis whatsoever—not a rule, regulation, or even opinion letter—to suggest that any so-called severance has the talismanic effect of converting a non-final order into a final one. The Board cannot augment the jurisdiction of the federal courts of appeals without more.

Moreover, the facts here do not support a Federal Rule of Civil Procedure 54(b)-type certification. *See United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 798 (9th Cir. 2017) (holding post-judgment order was not appealable "[b]ecause the district court failed to find there was no need for further delay"). In its applied-from decision, the Board ordered the administrative law judge assigned to the case to "prepare a supplemental decision." *See* Dkt. No. 1-5 at 14. "Supplemental" suggests that the decision is still part of the same proceeding.[1] More fundamentally, the Board itself has not promulgated any Rule 54(b)-type procedure by which parties or courts can evaluate finality when less than all claims have been resolved.

Not only would such jurisdictional manipulation be legally improper, but it would have significant practical consequences. Enforcing the Board's order here would deprive Rio of its statutory right to petition this court or a sister court of appeals to review and set aside the Board's final order. As Rio waited in anticipation of a final order of the Board, the Board itself dashed to the nearest stamp machine to file a premature application for enforcement with this court. As a result, the rules prevented Rio from filing a petition in its own venue of choice.

[1] The Board does not cite a single finding in its applied-from order that the remanded allegations were "discrete" for purposes of jurisdiction. More importantly, the administrative law judge's "supplemental" order retains the same case number as the original complaint and the applied-from order.

See 28 U.S.C. § 2112(a) (2016). Instead, the Board prematurely filed its own enforcement application with this court and the ink from the stamp on the application has long since dried with still no final order issued.

II. THE BOARD'S FINDING REGARDING THE WALKING-OFF-THE-JOB RULE CANNOT BE RECONCILED WITH *BOEING*.

Whatever the effect of the Board's made-up severance procedure in conferring finality, partial summary enforcement should be denied because the Board's *Boeing* decision overruled the essential test upon which the Board decided whether all the handbook rules in this case would be "reasonably construed" to prohibit protected activity under the National Labor Relations Act ("Act"). *See* 365 N.L.R.B. No. 154. The Board nevertheless seeks summary enforcement of its finding that Rio violated section 8(a)(1) of the Act by maintaining a work rule in its employee handbook that restricts walking off the job during an assigned shift. In relevant part, the walking-off-the-job policy provides: "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated from employment." Excerpt of the Record ("ER") 139. That facially neutral handbook rule is precisely the kind of work rule that the *Boeing* Board held cannot be unlawful "when reasonably interpreted" and when "the nature and extent of the potential impact on NLRA rights" is outweighed by "legitimate justifications associated with the requirement." *Boeing*, slip op. at 14.

With the *Boeing* decision overruling the standard by which the Board judges

all facially neutral work rules, the Board has consummated a series of precedential rulings that together mark its foray into yet unknown applications and interpretations of the Act.[2] *Boeing* post-dates the evidentiary hearing that found the walk-off-the-job rule unlawful. Moreover, Rio did not have the benefit of *Boeing* in defending its walking-off-the-job rule before the Board and now before the court. Yet, *Boeing* has precedential bearing on the adjudication of any challenge to the rule because the Board retroactively adopted the *Boeing* standard after concluding that "failing to apply the new standard retroactively would 'produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *Boeing*, slip op. at 17 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Because the new standard applies retroactively to the walking-off-the-job rule, remand to the Board to reconsider the rule is the only legally consistent outcome here.

The Board seeks to distract by pointing to an agency-level finding that Rio's

[2] *See UPMC & UPMC Presbyterian Shadyside*, 365 N.L.R.B. No. 153 (2017) (reversing earlier rule that administrative law judges can only accept settlements where all parties agree); *Hy-Brand Indus. Contractors, Ltd. & Brandt Constr. Co.*, 365 N.L.R.B. No. 156 (2017) (reversing two businesses can be joint employers when one has "indirect" or "reserved" control over the other's workers); *PCC Structurals Inc.*, 365 N.L.R.B. No. 160 (2017) (reversing rule that employers seeking to expand scope of a bargaining unit must show that workers they want included share an "overwhelming community of interest" with those in the workers' proposed unit); *Raytheon Network Centric Sys.*, 365 N.L.R.B. No. 161 (2017) (reversing rule that revisions to the terms of employment that are consistent with past practices are unilateral changes that must be bargained).

"rule against walking off the job is 'devoid of ambiguity' and constitutes an 'explicit restriction' on employees' statutory right to engage" in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Mot. at 6; 29 U.S.C. § 157 ("section 7"). But, the rule itself contains not one word suggesting that the Company's walking-off-the-job policy was intended to chill the exercise of section 7 rights. To the contrary, the rule specifically applies to "[e]mployees who walk off the job during [their] shift," not to employees who engage in protected strikes or work stoppages. ER 139. To hold that such a rule explicitly violates the NLRA would be equivalent to holding that any simple restriction on employees walking off the job during a scheduled shift—even to socialize with a customer or play hooky from work—is unsustainable. That result surely contravenes the Act, and demonstrates that Rio's rule is not an explicit abridgement of section 7.

The court's decision in *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976), does not suggest otherwise. *Robertson Industries* found a section 8(a)(1) violation where an employer terminated several employees who refused to report to work and instead attended a meeting at a union hall as part of a larger work stoppage organized by their union. *Id.* By contrast, the handbook rule here contains no mention of work stoppages or protected strikes, no grievance was ever filed challenging the rule, and no employee was ever disciplined for engaging in

conduct even remotely resembling concerted activity protected by the Act. *See* ER 86-88, 100.

In short, there is no rational way to reconcile the Board's conclusion that even a single handbook rule in this case violates the Act with the standard it adopted in *Boeing* and applied retroactively. The Board's finding that Rio's walking-off-the-job rule violates section 8(a)(1) cannot be sustained any more than the other findings that the Board now asks the court to remand.

III. THE PETITIONER-INTERVENOR'S ARGUMENTS AGAINST REMAND ARE UNAVAILING.

Finally, the facts here do not support the assertions and representations made by the Petitioner-Intervenor, the International Union of Painters and Allied Trades, District Council 15, Local 159, AFL-CIO ("union"), in its opposition to the Board's motion for partial remand. The union argues that the court cannot remand the case without the Board first ordering remand. Union Opp'n at 1-2. Yet, even if the court's jurisdiction were undisputed here—which it is not—such a requirement belies the statutory rule that the "jurisdiction of the court shall be exclusive" after the Board issues a final order. 29 U.S.C. § 160(e). By its terms, the Act provides that no action of the Board can remove the exclusive jurisdiction of the court. *Cf. New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 687-88 (2010) (holding Board is free to exercise its statutory and regulatory powers with a lawfully appointed quorum). It is the purview of the court—not the Board—to police its own

jurisdiction and remand the case.

The union's suggestion that the Board, not its General Counsel, must seek remand has no support in the law. To the contrary, the Act gives the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . other duties as the Board may prescribe or as may be provided by law." 29 U.S.C. § 153(d). The Board circumscribed its authority to seek enforcement of its orders in the federal courts of appeals to the General Counsel acting on the Board's behalf. *See* 29 U.S.C. § 160(e). So, the union's suggestion that the General Counsel cannot also seek remand unless the Board has issued an order asking for remand is unsupportable.

Similarly, the union cites no authority for its assertion that the court cannot remand the case because the union did not receive notice to contest the Board's decision in *Boeing* (Union Opp'n at 2)—a wholly separate case. Whatever notice was due to the union in *Boeing*, the union's standing to contest a finding of the Board in court is limited to the instant case. Accordingly, the union's petition for review cannot be a vehicle to mount a due process challenge to *Boeing*.

The union also makes a specious argument that the court cannot remand the case until the Board rules on the union's motion for reconsideration in *Boeing*—again, a wholly different case that is not before the court. Union Opp'n at 1-3. The error with this argument is immediately apparent. The union cannot

collaterally attack the *Boeing* decision in court by petitioning the court to review the instant case. There is no dispute that the court does not have jurisdiction to review the Board's *Boeing* decision. Even so, the union points to no statute, regulation, or subregulatory guidance that calls into question the validity of *Boeing* based on the composition of the Board.

IV. CONCLUSION

For the foregoing reasons, Rio requests that the court deny the Board's motion as to summary enforcement, dismiss the consolidated application for enforcement and petition for review from the Board's Order, and remand the case, in full, to the Board.

Respectfully submitted,

February 20, 2018

/s/ *Lawrence D. Levien*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point Times New Roman font.

/s/ *Lawrence D. Levien*
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February 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on February 20, 2018, I electronically filed the foregoing Opposition to the National Labor Relations Board's Motion for Partial Summary Enforcement with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/ *Lawrence D. Levien*
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February 20, 2018